IDEA Practice Tips:
Hot Topics Affecting NYS IHO Practice

NYSED Impartial Hearing Officer Training, Webinar 2
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Deusdedi Merced, Esq.

923 Saw Mill River Road, # 277
Ardsley, New York 10502
(914) 231-9370 • (914) 231-5461 (facsimile)
dmerced@me.com

I. INTRODUCTION

A. Throughout this past year, the New York State Education Department (NYSED) and individual hearing officers have identified to the training team various, discrete issues that affect the work of the independent hearing officers (IHO), which warrant discussion.

B. This outline provides practice tips on the identified issues.

II. TESTIMONY BY AFFIDAVIT

A. Law. New York State (NYS) regulation authorizes the IHO to "take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross-examination."[1] It is, therefore, within the IHO's discretion whether to require direct testimony by affidavit.[2]

B. Hearsay v. Weight. Because the formal rules of evidence do not apply in IDEA hearings, testimony by affidavit is not subject to objection as hearsay. The adequacy of the affidavit is a matter that the IHO can consider when deciding what weight, if any, to give the testimony.

C. Utility. The use of direct testimony by affidavit in lieu of in-hearing testimony can make the hearing more efficient, provided the IHO effectively implements a process by which the parties are

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[1] 8 NYCRR § 200.5(j)(3)(xii)(f). *See also* 34 C.F.R. § 300.512(a)(2) ("Any party to a hearing … has the right to [p]resent evidence and confront, cross-examine, and compel the attendance of witnesses.").
[2] *See*, *e.g.*, *Application of a Student with a Disability*, Appeal No. 13-157, 113 LRP 52615 (SEA NY 2013) (finding that the IHO exercised sound discretion in requiring the presentation of direct testimony by affidavit).

adequately provided with the opportunity to thoughtfully prepare testimony by affidavit. The pre-hearing conference presents an early opportunity to discuss the use of direct testimony by affidavit and to establish parameters of practice.

D. Practice Tips. The following are matters to consider prior to, and during, discussions with the parties on whether to exercise discretion to allow direct testimony by affidavit and on the ground rules for its use.

1. Whether competent counsel represents the parties. The use of direct testimony by affidavit may not be appropriate when the parent is appearing *pro se*.

2. Limiting direct testimony to supplement an inadequate affidavit resulting from the careless work of the submitting attorney. While the IHO should exercise flexibility when deciding whether to allow supplemental, direct testimony, advising the parties ahead of time that supplemental, direct testimony will be limited to extraordinary circumstances increases the chances that the attorneys will thoughtfully prepare the affidavits.[3]

3. The timeline by when the parties must exchange copies of the affidavits of their respective witnesses. The IHO should consider requiring the exchange of affidavits in advance of the five-day deadline[4] to allow each party the opportunity to disclose rebuttal testimony by affidavit (or witnesses) or to submit interrogatories, should the IHO permit such practice.

4. How to address objections to irrelevant or prejudicial questions or testimony. The IHO should outline for the parties how objections to irrelevant or prejudicial questions or testimony should be brought to the IHO's attention and how any irrelevant or prejudicial questions or testimony will be stricken from the record should the IHO sustain the objection(s).

5. Addressing the feasibility of using direct testimony by affidavit when the parents or witnesses are non-English

[3] The IHO may also want to consider reserving the right to ask the affiant clarifying questions even if the parties/counsel stipulate to the admission of the affidavit.

[4] 34 C.F.R. § 300.512(a)(3) (prohibiting the introduction of any evidence at the hearing that has not been disclosed to the other party at least five business days before the hearing).

speakers. NYS law requires that prior written notice and the procedural safeguards be translated into the parents' native language.[5] Though State law applicable to court proceedings require affidavits to be filed in English, unless accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate,[6] the same requirement does not extend to IDEA hearings.[7]

III. AMENDMENTS TO THE DUE PROCESS COMPLAINT

A. Opportunity to Amend if Complaint is Insufficient. Should the IHO determine that the due process complaint is insufficient, the IHO may dismiss the complaint but not before granting the complaining party an opportunity to amend the complaint.[8]

If the IHO determines the complaint is not sufficient, the IHO's decision must identify how the complaint is insufficient, so that the complainant can amend the complaint, if appropriate.[9] Should the complainant not amend, the complaint may be dismissed.[10]

Both the resolution timeline and the 45-day timeline begin again with the filing of the amended due process complaint.

B. Amendments to Complaint, Generally. A party may amend its complaint only if the other party consents or the IHO grants permission and the non-complaining party is given the opportunity to convene a resolution meeting. But, such permission may only be granted not later than 5 calendar days before the hearing.[11] In addition, the timelines begin again for both the resolution meeting and the decision with the filing of the amended due process complaint.[12] However, if a parent is not able to amend the

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[5] 8 NYCRR § 200.5(a)(4), (f)(2).
[6] Civil Practice Laws and Rules § 2101(b).
[7] *See, e.g., Bethlehem Area Sch. Dist. v. Zhou*, 976 A.2d 1284, 53 IDELR 24 (Pa. Cmwlth. 2009) (holding that there was "[n]o authority … extending the qualified right to interpretive services during administrative or judicial proceedings to the provision of translated transcripts…").
[8] *See Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 52 IDELR 266, Question C-4 (OSERS 2009).
[9] *Id. Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46698 (August 14, 2006).
[10] *Id.*
[11] 34 C.F.R. § 300.508(d)(3).
[12] 34 C.F.R. § 300.508(d)(4).

complaint, a separate complaint may be filed on the issue.[13]

For the sake of expediting resolution of the student's educational situation and judicial economy (i.e. avoiding a separate hearing) IHOs should consider encouraging school districts to agree to amendments after the 5-day deadline but prior to commencement of the first hearing session, and possibly further agreeing to waive returning to a resolution meeting and the restarting of the timelines when a quick informal discussion would suffice or a resolution meeting would be futile. If prejudice is alleged an attempt should be made to address it in order to encourage the agreement. (It might also be pointed out that any separate due process complaint filed later may be consolidated with the pending matter.)

IV. AMENDMENTS TO WRITTEN DECISIONS

A. For Technical Errors. IHOs are allowed to amend their decisions for technical and typographical errors, subject to State procedures and provided proper notice is given.[14] It is equally permissible for a party to request of the IHO correction of such errors when the correction does not change the outcome of the hearing or the substance of the final hearing decision.[15]

B. Reconsideration of Decision. Reconsideration of the hearing decision is subject to State procedures and may not delay or deny the parents' right to a decision within the required timeline.[16]

Once a final decision has been issued, no motion for reconsideration is permissible.[17] States, however, can adopt procedures to allow motions for reconsideration prior to issuing a final decision, provided the final decision is issued within the 45-day timeline or a properly extended timeline.[18]

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[13] 34 C.F.R. § 300.513(c).
[14] *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12613 (March 12, 1999).
[15] *Questions and Answers on Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question C-25 (OSEP 2013).
[16] *Analysis and Comments to the Regulations*, Federal Register, Vol. 64, No. 48, Page 12613 (March 12, 1999). *See also Letter to Wiener*, 57 IDELR 79 (OSEP 2010).
[17] *Id. See also Questions and Answers on Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question C-25 (OSEP 2013).
[18] *Id.*

New York has not adopted any formal procedures permitting motions for reconsideration.

V. COMPILING THE HEARING RECORD

A. The Record. Establishing an accurate record is one of the IHO's most important responsibilities. The record is extremely important if the decision is appealed. What makes up the record has been the subject of great debate. Following are best (and required[19]) practices for the IHO to consider.

B. General Rules.

1. The IHO should be mindful of problems that will adversely affect the record of the hearing being made, such as overlapping conversations, use of acronyms, proper spelling of names, questioners/witnesses referring to exhibits without citing to exhibit numbers, and the use of clarifying gestures.

2. Endeavor to mark all items as an exhibit of a party or of the IHO (for ease of identification and reference).

3. Do not mark up exhibits or legal memoranda. Instead, make copies and mark up the copies. The record should only include the unmarked submissions.

4. Date stamp all documents received.[20] This would assist with establishing timelines.

5. Should the IHO be unsure of what's in or not, the IHO should contact both parties in writing to clarify.

6. Requests for an extension of the 45-day timeline should be documented in writing, and the reasons given should be incorporated in the order, which must be in writing and made part of the record.[21] In addition to the good cause reason for the request, the written order should include the analysis required pursuant to 8 NYCRR § 200.5(j)(ii), (iii), as appropriate, and, if the request is granted, the new decision

[19] Requirements pursuant to the Regulations of the Commissioner of Education are identified as such in the footnotes and accompanying text.
[20] Alternatively, append the forwarding email to any attached document(s) for submissions that are made by electronic mail.
[21] *See* 8 NYCRR § 200.5(j)(5)(i), (iv).

date.[22]

7. Prior to the five-day disclosure deadline, review and organize the documents in the file with an eye towards providing the parties/counsel with a list of IHO exhibits, which may include all correspondence, pleadings, motions/requests, orders or other tangible items that have been submitted to date. Provide the parties/counsel with an advance copy of the IHO Exhibit List and advise that the list will be discussed at the start of the hearing.[23]

8. Prior to the start of the hearing, and after discussing exhibits with the parties/counsel, review the IHO Exhibit List with the parties/counsel and address any concerns that are raised.

9. The record should not include documents or other tangible, non-documentary items that were not filed directly with the IHO.

10. The IHO decision must include a list identifying each exhibit admitted into evidence, providing the date, number of pages, and exhibit number or letter. The decision shall also include an identification of all other items the IHO has entered into the record.[24]

11. Items that are not admitted into the record, but which are to be made part of a separate record for purposes of an appeal, should be clearly marked and kept together (e.g., in a labeled envelope). Note in the IHO decision what proposed exhibits make up the separate record.

12. Certify the record to the school district.[25]

C. Contents of the Complete Record. The complete record should consist of the following, as appropriate and as determined by the facts and circumstances of each case:[26]

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[22] *Id.*

[23] Even if this approach is not used, it is good practice to discuss with the parties/counsel prior to the start of the hearing what pre/post-hearing documents will be part of the record.

[24] 8 NYCRR § 200.5(j)(5)(v).

[25] 8 NYCRR § 200.5(j)(5). *See* Sample Certification of the Record Form, attached.

[26] This is not an exhaustive list.

1. The due process complaint;

2. The notice of IHO appointment;

3. The school district or other party response to the due process complaint;

4. Notice of Insufficiency;

5. All notices of proceedings;

6. All correspondence filed with (e.g., resolution meeting disposition form) or by the IHO, including email correspondence;

7. Prehearing orders;

8. Motions, briefs, and orders;

9. All documents or other tangible, non-documentary items (e.g., photographs, videotapes, sound recording) admitted into evidence at the hearing;

10. Any written or electronic, verbatim record of prehearing conferences and other on-the-record discussions;

11. A written or electronic, verbatim record of the due process hearing; and

12. Any final order, i.e., IHO Determination/Decision, Order of Dismissal, or Order of Withdrawal.

VI. FAILURE TO PROSECUTE

A. Authority. An IHO has authority to dismiss a due process complaint with prejudice for the parents' failure to prosecute and comply with reasonable directives issued during the proceeding.[27]

B. Exercise Appropriate Restraint. There are many factors to consider in determining whether the parents have committed a sanctionable offense warranting dismissal for failure to prosecute. These factors

[27] *See, e.g., In re Student with Disability*, 109 LRP 56222 (SEA NY 2009).

should be carefully considered and the IHO should first test the effectiveness of lesser sanctions, when appropriate.[28]

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[28] For a thorough discussion of the factors to consider, *see* Deusdedi Merced, *The Sanctioning Authority of IDEA Hearing Officers*, NYS Hearing Officer Training (March 2013).